

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

\* \* \*

RICHARD EVALOBO and PRISCILLA  
SANTOS CORTEZ,

Plaintiffs,

v.

ALDRIDGE PITE, LLP; REBECCA P.  
KERN, ESQUIRE; and U.S. BANK, N.A.,

Defendants.

Case No. 2:16-cv-00539-APG-VCF

**ORDER GRANTING DEFENDANTS'  
MOTION TO DISMISS**

(ECF No. 9)

Plaintiffs Richard Evalobo and Priscilla Santos Cortez bring this suit requesting injunctive relief and damages against defendant U.S. Bank, N.A. and the lawyers who represented U.S. Bank in the foreclosure sale of their home. The plaintiffs claim the foreclosure was unlawful because the defendants relied on a forged Deed of Trust and they failed to produce the original promissory note before foreclosing. The defendants respond that this case is barred under res judicata due to prior cases brought by Cortez. Alternatively, the defendants contend that each of the plaintiffs' causes of action fails to state a claim on the merits.

Res judicata does not apply because the defendants have not established that a previous action based on the same claims reached a final judgment on the merits. However, each of the plaintiffs' causes of action fails as a matter of law. I therefore grant the defendants' motion to dismiss, with leave to amend some claims.

**I. BACKGROUND**

In January 2006, the plaintiffs purchased real property located at 1020 Zurich Avenue, Henderson, Nevada. ECF No. 9 at 22–28. To finance the purchase, the plaintiffs obtained a loan of \$405,150 from Alliance Bancorp, evidenced by a promissory note that was secured by a Deed

1 of Trust (DOT) recorded against the property.<sup>1</sup> *Id.* at 30–55. Mortgage Electronic Registration  
2 Systems, Inc. (MERS) was the designated beneficiary under the DOT. *See id.* at 30. On August  
3 1, 2011, Evalobo quitclaimed his interest in the property to Cortez. ECF No. 9-1 at 2–3. Later  
4 that year, MERS assigned the DOT to Aurora Bank, FSB, who in turn assigned it to Nationstar  
5 Mortgage LLC in 2012. *Id.* at 5–9.

6 In 2014, Nationstar recorded a Notice of Default and Election to Sell to commence non-  
7 judicial foreclosure proceedings. *Id.* at 11–17. A Certificate of Foreclosure was recorded on  
8 March 12, 2015 and a Notice of Trustee’s Sale was recorded on April 3, 2015. *Id.* at 19, 21–23.  
9 A final assignment of the DOT from Nationstar to U.S. Bank was executed on April 23, 2015. *Id.*  
10 at 25–26. The property was sold at public auction on April 24, 2015 and a Trustee’s Deed Upon  
11 Sale vesting title in U.S. Bank was recorded on May 5, 2015. *Id.* at 28–31.

12 Prior to and during the foreclosure, Cortez filed four lawsuits attacking the foreclosure  
13 proceedings and seeking to invalidate the DOT. Her first lawsuit, filed on August 21, 2012 in  
14 Nevada state court, was dismissed for lack of service. *Id.* at 33–58. Her second lawsuit, a small  
15 claims suit filed in Henderson Justice Court, alleged Nationstar had violated California law, the  
16 Fair Debt Collection Practices Act, and the Fair Credit Reporting Act. *Id.* at 4. The parties  
17 elected to proceed to mediation, and the court dismissed the complaint with prejudice at Cortez’s  
18 direction. *Id.* at 6–7. Cortez initiated her third and fourth lawsuits against Nationstar and other  
19 defendants in Nevada state court. *See Cortez v. Merscorp Holdings, Inc.*, No. 2:14-CV-01048-  
20 GMN-NJK, ECF No. 1-2 at 5 (D. Nev. June 27, 2014); *Cortez v. Nationstar Mortgage, LLC, et*  
21 *al.*, 2:15-cv-01085-GMN-NJK, ECF No. 1-1 at 2 (D. Nev. June 8, 2015). Those cases were  
22 removed to the District of Nevada and consolidated into a single case in 2015. *See Cortez v.*  
23 *Merscorp Holdings, Inc.*, No. 2:14-CV-01048-GMN-NJK, ECF No. 26 (D. Nev. Jul. 21, 2015).  
24 The Court dismissed that case with prejudice for failure to effectuate service. *Id.*, ECF No. 47  
25 (D. Nev. Dec. 4, 2015). The present case is Cortez’s (at least) fifth attempt to avoid foreclosure.

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27 <sup>1</sup> The plaintiffs dispute the legitimacy of the DOT presented by the defendants in this case.  
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## 1 II. ANALYSIS

2 In considering a motion to dismiss, “all well-pleaded allegations of material fact are taken  
3 as true and construed in a light most favorable to the non-moving party.” *Wyler Summit P’ship v.*  
4 *Turner Broad. Sys., Inc.*, 135 F.3d 658, 661 (9th Cir. 1998). However, I do not necessarily  
5 assume the truth of legal conclusions merely because they are cast in the form of factual  
6 allegations in the plaintiff’s complaint. *See Clegg v. Cult Awareness Network*, 18 F.3d 752, 754–  
7 55 (9th Cir. 1994). A plaintiff must make sufficient factual allegations to establish a plausible  
8 entitlement to relief. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007). Such allegations  
9 must amount to “more than labels and conclusions, [or] a formulaic recitation of the elements of  
10 a cause of action.” *Id.* at 555.

### 11 A. Res Judicata

12 The defendants argue that the present suit is barred by res judicata, also known as claim  
13 preclusion, asserting that Cortez brought at least two prior lawsuits against parties in privity with  
14 the defendants that concerned the same claims and reached a final adjudication on the merits.  
15 The plaintiffs respond that they are raising new claims that could not have been raised in the  
16 earlier lawsuits.

17 Claim preclusion prohibits lawsuits on “any claims that were raised or could have been  
18 raised” in a prior action. *Owens v. Kaiser Found. Health Inc.*, 244 F.3d 708, 713 (9th Cir. 2001).  
19 It applies when there is “1) an identity of claims; 2) a final judgment on the merits; and 3)  
20 identity or privity between parties.” *Id.* Each prong must be satisfied for the prior case to have  
21 preclusive effect. On the first prong, there is an identity of claims where two lawsuits arise from  
22 “the same transactional nucleus of facts.” *Tahoe-Sierra Preservation Council v. Tahoe Regional*  
23 *Planning Agency*, 322 F.3d 1064, 1077–78 (9th Cir. 2011). On the second prong, Federal Rule  
24 of Civil Procedure 41(b) states that “[u]nless the dismissal order states otherwise,” an  
25 involuntary dismissal, “except one for lack of jurisdiction, improper venue, or failure to join a  
26 party, . . . operates as an adjudication on the merits.” The Supreme Court has interpreted the  
27 jurisdictional exception broadly. *Costello v. United States*, 365 U.S. 265, 286 (1961) (“We  
28



1 regard the exception as encompassing those dismissals which are based on a plaintiff's failure to  
2 comply with a precondition requisite to the Court's going forward to determine the merits of his  
3 substantive claim."). The Ninth Circuit recently held that where the district court's dismissal  
4 was at least in part for failure to effectuate service, the Rule 41(b) exception applied and the later  
5 suit was not precluded. *Ruiz v. Snohomish Cty. Pub. Util. Dist. No. 1*, 824 F.3d 1161, 1164 (9th  
6 Cir. 2016) (quoting with approval the Second Circuit's statement that "[a] dismissal for failure of  
7 service of process, of course, has no res judicata effect").

8 The defendants first seek to establish claim preclusion from the 2012 lawsuit Cortez filed  
9 in Henderson small claims court. The defendants provide only a docket summary, however,  
10 which does not contain enough information to show that there is an identity of claims. The  
11 docket identifies the plaintiff as Cortez, the defendant as Nationstar, and that Cortez brought  
12 claims regarding the property located at 1020 Zurich Ave. But it does not mention either the  
13 promissory note or the DOT, nor does it give any detail as to the nature of the complaint.

14 The other case the defendants put forward for its preclusive effect is *Cortez v. Merscorp*  
15 *Holdings, Inc.*, No. 2:14-CV-01048-GMN-NJK, 2015 WL 1201292 (D. Nev. Mar. 16, 2015).  
16 There, the district court initially denied the defendants' motion to dismiss for improper service,  
17 instead giving Cortez an additional thirty days to comply. When she failed to do so, the court  
18 dismissed the suit with prejudice. *Id.*, ECF No. 47 (D. Nev. Dec. 4, 2015).

19 The district court's dismissal order could be interpreted as a dismissal either for improper  
20 service under Rule 4(m) or for failure to prosecute under Rule 41(b). As explained above, a Rule  
21 4(m) dismissal is jurisdictional and thus does not have res judicata effects. A "failure to  
22 prosecute" dismissal, by contrast, is not jurisdictional and is considered an adjudication on the  
23 merits. *See, e.g., Nealey v. Transportacion Maritima Mexicana, S. A.*, 662 F.2d 1275, 1278 (9th  
24 Cir. 1980). Courts assessing the res judicata effect of a prior judgment must apply Rule 41(b) to  
25 make their own determination of its preclusive effect. The prior court's use of the language  
26 "with prejudice" is not conclusive. *See, e.g., Charchenko v. City of Stillwater*, 47 F.3d 981, 985  
27 (8th Cir. 1995); *Baris v. Sulpicio Lines, Inc.*, 74 F.3d 567, 572 (5th Cir. 1996). I construe this as  
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1 a Rule 4(m) dismissal because the stated reason for dismissal was that the “[p]laintiff has failed  
2 to demonstrate that she has properly effectuated service on Defendants . . . .” *Cortez v. Merscorp*  
3 *Holdings, Inc.*, No. 2:14-CV-01048-GMN-NJK, ECF No. 47 at 1 (D. Nev. Dec. 4, 2015).

4 Additionally, the order that preceded the dismissal cited Rule 4(m), which provides that if a  
5 defendant is not served within 120 days after the complaint is filed, the court “must dismiss the  
6 action without prejudice against that defendant or order that service be made within a specified  
7 time.” *Id.*, ECF No. 44 at 3 (D. Nev. Oct. 28, 2015). The court chose the latter. *Id.* Conversely,  
8 neither the moving defendant nor the court cited Rule 41(b), nor did the court describe the  
9 dismissal as one for failure to prosecute. A dismissal for improper service does not have claim  
10 preclusive effect. *Ruiz*, 824 F.3d at 1164.

11 Because the defendants have not established that all three required elements for claim  
12 preclusion have been met in any of the prior cases brought by Cortez, this suit is not barred by  
13 claim preclusion. I therefore evaluate whether the plaintiffs have stated a claim for relief.

#### 14 **B. Mail Fraud**

15 The plaintiffs claim that by forging the DOT, the defendants violated 18 U.S.C. § 1341,  
16 the federal mail fraud statute. The statute states that a violator “shall be fined under this title or  
17 imprisoned not more than 20 years, or both” and contains no private right of action. *See Ryan v.*  
18 *Ohio Edison Co.*, 611 F.2d 1170, 1178–79 (6th Cir. 1979). The defendants correctly argue that  
19 because this criminal statute lacks a private cause of action for civil damages, dismissal is  
20 appropriate. Moreover, the plaintiffs do not respond to this contention so dismissal is  
21 appropriate under Local Rule 7-2(d). I therefore dismiss this cause of action with prejudice.

#### 22 **C. Common Law Fraud**

23 The plaintiffs claim that the DOT being foreclosed upon is forged. The defendants argue  
24 that this is a fraud claim and that the complaint does not meet the heightened pleading standards  
25 of Rule 9(b) because it fails to plausibly specify why the DOT is fraudulent.

26 Litigants alleging fraud “must state with particularity the circumstances constituting fraud  
27 or mistake.” Fed. R. Civ. P. 9(b). The pleading “must state precisely the time, place, and nature  
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1 of the misleading statements, misrepresentations, and specific acts of fraud.” *Kaplan v. Rose*, 49  
 2 F.3d 1363, 1370 (9th Cir. 1994). In other words, the allegations must state “the who, what,  
 3 where, when, and how” of the fraud. *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th  
 4 Cir. 2003). “The plaintiff must set forth what is false or misleading about a statement, and why  
 5 it is false.” *Id.* (internal citations omitted).

6 The Clark County Recorder’s Office records show a DOT on the subject property with an  
 7 instrument number of 200601170003647, and identify the parties to that instrument as the  
 8 plaintiffs and Alliance Bancorp.<sup>2</sup> In a 2012 lawsuit regarding the same promissory note and  
 9 DOT at issue here, Cortez described applying for and receiving a loan to finance the property,  
 10 secured by a DOT:

11 On or about January 5, 2006, Plaintiff signed the Promissory Note  
 12 (“NOTE”) naming ALLIANCE as the Lender . . . . The terms stated  
 13 on the face of the actual NOTE were \$405,150.00 for 360  
 14 months . . . . The NOTE was secured with a first Deed of Trust,  
 (“DEED”), dated January 5, 2006, recorded January 17, 2006, under  
 Instrument No. 20060117-0003647. Defendant ALLIANCE is the  
 Lender on the DEED . . . .

15 ECF No. 9-1 at 38–39. While that lawsuit complained that the loans’ terms were unfair, Cortez  
 16 did not dispute that she executed the loan documents. In a later lawsuit, Cortez again stated she  
 17 “obtained the property through deed of trust” and that “[a] representative copy of this Deed of  
 18 Trust [is] attached and incorporated by reference to this Complaint . . . .” Complaint at 6–7,  
 19 *Cortez v. Merscorp Holdings, Inc.*, No. 2:14-CV-01048-GMN-NJK, 2015 WL 1201292, at \*1  
 20 (D. Nev. Mar. 16, 2015). The DOT Cortez attached to that complaint contains the plaintiffs’  
 21 signatures and appears otherwise identical to the DOT now offered by the defendants, which the  
 22 plaintiffs allege is a forgery.

23  
 24 <sup>2</sup> Clark County Recorder’s Office, Records Search System,  
 25 <https://recorder.co.clark.nv.us/recorderecommerce/>. I may take judicial notice of “matters of  
 26 public record without converting a motion to dismiss into a motion for summary judgment, as  
 27 long as the facts noticed are not subject to reasonable dispute.” *Intri-Plex Techs., Inc. v. Crest*  
 28 *Grp., Inc.*, 499 F.3d 1048, 1052 (9th Cir. 2007). Records of real property transactions are  
 “official public records.” See *Ormsby v. First Am. Title Co. of Nev.*, 591 F.3d 1199, 1203 (9th  
 Cir. 2010).



1           Given Cortez's prior admissions, it is not plausible for the plaintiffs to argue that they did  
2 not enter into the loan or DOT. It is likewise insufficiently specific for the plaintiffs to nakedly  
3 say that the DOT offered by the defendants—which matches the instrument number and loan  
4 amount that the plaintiffs previously admitted to—is a wholesale forgery. The plaintiffs must  
5 plausibly and with particularity specify in what way the DOT offered by the defendants has been  
6 altered from the DOT Cortez admitted to entering into in prior litigation. I therefore dismiss this  
7 cause of action with leave to amend.

#### 8           **D. Breach of Contract**

9           The plaintiffs argue that the defendants breached their obligations in the DOT in three  
10 ways. First, they point to a paragraph in the DOT that reads, "'Note' means the promissory note  
11 signed by the Borrower and dated January 5, 2006." ECF No. 9 at 30. They argue this "makes it  
12 clear that only the original promissory note is required." ECF No. 5 at 18. In other words, they  
13 contend that the defendants could not foreclose pursuant to the DOT without producing the  
14 original promissory note. However, the cited language is a definition and does not oblige the  
15 defendants to do anything. No other provision in the DOT requires the defendants to produce the  
16 original promissory note before foreclosing.

17           The second theory for breach of contract is that the DOT is forged. This does not state a  
18 claim for breach of contract. Rather it is a restatement of the fraud claim discussed in the  
19 previous section.

20           The third theory is that the defendants breached the DOT provision stating that "the  
21 borrower is lawfully seised of the estate hereby conveyed and has the right to mortgage, grant  
22 and convey the Property . . . ." ECF No. 9 at 32. The plaintiffs do not explain how the  
23 defendants have breached this provision. The provision is the borrower's promise to the lender  
24 that the borrower has lawful title to the property without encumbrances. In other words, it  
25 creates no obligation on the lender's part.

26           None of the three theories states a plausible claim for breach of contract, and none could  
27 be satisfactorily amended to do so. I therefore dismiss this cause of action with prejudice. If the  
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1 plaintiffs have sufficient facts to properly allege a breach of contract claim, they may file an  
2 amended complaint containing that claim.

3 **E. Lack of Promissory Note**

4 The plaintiffs argue that various provisions of the Uniform Commercial Code require the  
5 defendants to “allow[] for an inspection to determine the authenticity or genuineness of the  
6 alleged notes the defendants are using in attempting to foreclose . . . .” ECF No. 5 at 21. The  
7 defendants respond that this “show me the note” theory has been rejected in Nevada. The  
8 plaintiffs do not refute this characterization of their claim, nor do they address the defendants’  
9 legal argument. I therefore grant the defendants’ motion to dismiss this claim as unopposed. *See*  
10 Local Rule 7-2(d). Moreover, the defendants “do not need to produce the note to the property in  
11 order to proceed with a non-judicial foreclosure.” *Juntilla v. RESI Home Loans IV. LLC*, 2013  
12 WL 1819636, \*1 (D. Nev. 2013) (citing NRS § 107.080). I therefore dismiss this cause of action  
13 with prejudice.

14 **F. “Void the Cognovit Note”**

15 The plaintiffs include a claim for relief asking the court to “void the cognovit note.” ECF  
16 No. 5 at 22. I construe the claim as a request to void the promissory note based on the  
17 defendants’ failure to produce it upon foreclosure. This restates the “show me the note” theory  
18 discussed above. I therefore dismiss this cause of action with prejudice.

19 **G. Securitization’s Effect on the Note**

20 The plaintiffs include a paragraph in their demand for relief stating that “[o]nce the  
21 Promissory Note has been securitized, by law it no longer exists as a negotiable instrument . . . .”  
22 *Id.* at 24. The plaintiffs do not include this as a separate cause of action, but to the extent it is a  
23 request to void the promissory note, this theory has been rejected in Nevada. *See, e.g., Reyes v.*  
24 *GMAC Mortg. LLC*, 2011 WL 1322775, at \*2 (D. Nev. Apr. 5, 2011) (“[T]he securitization of a  
25 loan does not in fact alter or affect the legal beneficiary’s standing to enforce the deed of trust.”).  
26 Furthermore, the plaintiffs consented to securitization in section 20 of the DOT which reads,  
27 “The Note or a partial interest in the Note (together with this Security Instrument) can be sold  
28



1 one or more times without prior notice to Borrower . . . .” I therefore dismiss this allegation with  
2 prejudice.

### 3 **H. FDCPA**

4 The plaintiffs allege the defendants violated the Fair Debt Collection Practices Act  
5 (FDCPA) while conducting the non-judicial foreclosure on the property. The substance of the  
6 alleged violation is that the DOT was a fraud, so attempts to collect a debt using it violated  
7 various provisions of the FDCPA. The defendants respond that foreclosure is not debt collection  
8 within the FDCPA’s meaning.

9 The Ninth Circuit recently held that “actions taken to facilitate a non-judicial foreclosure,  
10 such as sending the notice of default and notice of sale, are not attempts to collect ‘debt’ as that  
11 term is defined by the FDCPA.” *Ho v. ReconTrust Co., NA*, 840 F.3d 618, 621 (9th Cir. 2016).  
12 The trustee that foreclosed on the property here was Quality Loan Service Corporation, who is  
13 not a party in this case. Quality included a statement at the bottom of its notice of default and  
14 notice of sale reading, “Quality may be considered a debt collector attempting to collect a debt  
15 and any information obtained will be used for this purpose.” ECF No. 9-1 at 12, 22, 30. This  
16 statement, however, does not convert the non-judicial foreclosure into an attempt to collect a  
17 debt under the FDCPA. *Ho*, 840 F.3d at 621.

18 I therefore dismiss the plaintiffs’ FDCPA claim. However, I will grant leave to amend  
19 because it is not clear whether there may be other communications from the defendants that  
20 pertained to attempts to collect a debt outside the foreclosure process. Such communications  
21 could be the basis for an FDCPA claim. To the extent such a claim is based on the contention  
22 that the DOT is a fraud, it must be pleaded with more specific and plausible allegations as  
23 described above.<sup>3</sup>

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24 <sup>3</sup> In their opposition to the motion to dismiss, the plaintiffs argue that the FDCPA was violated  
25 because the beneficiary of the foreclosure sale is not the original lender. These allegations are  
26 not in the complaint and therefore cannot be considered to save the complaint from dismissal.  
27 Further, because this is a variant of the securitization theory rejected above, I deny leave to  
28 amend to add it.

1 **III. CONCLUSION**

2 IT IS THEREFORE ORDERED that the defendants' motion to dismiss **(ECF No. 9)** is  
3 **GRANTED**. The plaintiffs are granted leave to amend the complaint to cure the defects in their  
4 common law fraud, contract, and FDCPA claims if sufficient facts exist. The other causes of  
5 action are dismissed with prejudice. The plaintiffs must file the amended complaint within 21  
6 days of entry of this order.

7 DATED this 20<sup>th</sup> day of December, 2016.

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ANDREW P. GORDON  
UNITED STATES DISTRICT JUDGE